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IN THE

Supreme Court of the United States

October Term, 1986

ANTHONY GAGGI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether petitioner's conviction should be reversed because the prosecutor failed to make timely disclosure of the fact that its key witness had admitted to prior perjury about the facts of this case?

2. Whether a new trial is required because the prosecutor then knowingly permitted its key witness to offer a plainly perjurious explanation of his prior lies?

List of Parties

Apart from petitioner, the other parties involved in the trial from which this petition results were Paul Castellano, Joseph Testa, Henry Borelli, Peter LaFroscia, Anthony Michael Senter, Ronald Ustica, Richard Mastrangelo, Ronald Turekian, and Edward John Rendini.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Anthony Gaggi respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 21, 1987.

Opinions Below

The opinion of the Court of Appeals, reported as *United States v. Gaggi,* 811 F.2d 47 (2d Cir. 1987), is reprinted in the Appendix at pages 1a-34a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 35a-36a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 21, 1987. A timely petition for rehearing was denied on March 13, 1987, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions

Title 18, United States Code:

§ 371. Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Statement of the Case

Anthony Gaggi petitions this Court following the affirmance of his conviction, after a jury trial, for violating 18 U.S.C. § 371. He is presently serving a sentence of five years imprisonment. (Duffy, U.S.D.J.) This case can only be fully understood, though, in the context of the broader charges that the government unsuccessfully sought to try. In 1984, a Southern District Grand Jury returned a 91-page, 78-count indictment which named 24 individuals (Paul Castellano, Anthony Gaggi, Joseph Testa, Patrick Testa, Henry Borelli, Peter LaFroscia, Anthony Michael Senter, Ronald Ustica, Judith May Hellman, Wayne Hellman, Sol Hellman, Paul Dordal, Richard Mastrangelo, Ronald Turekian, Herman Weisberger, Edward John Rendini, Joseph Guglielmo, Douglas Rega, Pedro Luis Rodriguez, Gus Kalevas, Salvatore Mangialino, Carlo Profeta, Dennis Testa, and Abdullah Mohammad Hassan Hussain) as defendants and alleged eleven separate conspiracies. This indictment contained a RICO count which itself alleged 80 acts of racketeering activity.

It was a trial tragically marred by prosecutorial misconduct which was then exacerbated by the trial court's knowing acquiescence.

Initially, the case was assigned to Judge Sofaer of the Southern District of New York, who denied defense motions for a severance of counts. *See United States v. Castellano,* 610 F. Supp. 1359 (S.D.N.Y. 1985). However, in July of 1985, upon Judge Sofaer's leaving the bench, the case was reassigned to Judge Kevin Duffy. Almost immediately, Judge Duffy expressed concern about the fairness of trying such a massive and complex indictment. On July 15th, he first expressed these reservations:

> I submit to you, ladies and gentlemen, if I permit hearsay to come in during this trial, exactly how do I charge the jury to explain to them that of the 11 conspiracies charged in the indictment they can consider statements of X only in connection with count Y and only then if they find that X was

> a member of that conspiracy and only then if the statement was made in furtherance of that conspiracy?
>
> How do you prove the agreement necessary for a conspiracy if you take out all of the statements of the defendants? How do you make sure, from the point of view of a district judge trying to do his job, that you don't have a bunch of slop-over and slip-back whereby people . . . get convicted because and merely because they were named in the indictment . . . .

(Transcript of July 15th proceeding at 14).

This concern was again made clear on July 24th: "[T]he more I get into this case, the more firmly I am convinced that in its present posture it is totally and completely untriable from anyone's point of view." (Transcript of July 24th at 18) Finally, on September 9th, for the above reasons, Judge Duffy severed the one indictment into "any number of trials." (Transcript of September 9th at 13)[1] This petition follows the first of those trials, a trial which featured a lead defendant, Paul Castellano, being gunned down on the street and, through the media, in front of both the jury and the rest of the New York Metropolitan area.

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[1] As explained *infra*, this decision irrevocably altered the course of the trial, as extraordinary measures, including lengthy conferences on the scope of direct, cross and re-direct examination, were taken to ensure that proof directed toward the other allegations in the original indictment were excluded. Unfortunately, as defendant makes clear in POINT 1, *infra*, this goal was thwarted by the government's failure to notify the defense that the only significant witness against Mr. Gaggi, Dominick Montiglio, had admitted to lying to the government and perjuring himself in the grand jury about Mr. Gaggi's culpability. The result of Montiglio's unexpected admission of perjury during cross-examination was a devastating and, as defendant contends in POINT 2, *infra*, plainly perjurious explanation of the prior perjury which wholly thwarted Judge Duffy's efforts to avoid spill-over prejudice.

Statement of the Facts

The broad outline of the government's proof in this case is discussed in the petition filed on behalf of co-defendant Ronald Ustica. Petitioner Gaggi adopts that brief's discussion of the proof in this statement of facts. In this brief, Gaggi will focus solely upon the proof against him.

The government's allegations against Anthony Gaggi were unique in that there was no claim that Gaggi had any day-to-day involvement in the alleged stolen car ring. No witness testified that Anthony Gaggi ever stole a car, replaced a vehicle identification number, provided counterfeit titles, or arranged for the shipping of any cars. Rather, Gaggi was alleged to be a higher-up in a rigidly hierarchical conspiracy, one that featured a defined role for each member and a constant jockeying for position and "promotions." (*See, e.g.*, T: 1533-34; T: 3477)[2] Indeed, Gaggi was acquitted of all substantive stolen car charges and convicted only on a conspiracy charge.

The government's summation clearly set out its theory of the case:

> The organization had a structure, a hierarchy. The top of the ladder, the president, the boss was Paul Castellano. *Second in command, the executive vice president, Anthony Gaggi.* The crew division chief was Roy DeMeo. Club members and workers and associates were Joey Testa, Tony Senter, Henry Borelli, Peter LaFroscia, Ronald Turekian, Eddie Rendini, Ronald Ustica . . . .
>
> * * *
>
> There were requirements for reporting. *The reporting went up from the crew up to DeMeo, up to Anthony Gaggi and on up to Paul Castellano. There was a protocol for seeing the president. Roy DeMeo could not go on his own, he had to go to Anthony Gaggi.*

---

[2] Numbers preceded by "T" refer to pages of the trial transcript. Numbers followed by the letter "a" refer to the Appendix to this petition.

* * *

> There was a system of successions and promotions you learned of when the group's former leader died way back in 1976, a new leader, Paul Castellano was chosen in '77. Castellano was promoted and Anthony Gaggi was promoted soon thereafter. Roy DeMeo sought to be promoted as well. His elevation was held up . . . .
>
> As the reporting obligations went up the ladder from crew to crew, chief to vice president to president, so did the money made on illegal car deals. There were fringe benefits in this business. The fringe benefits included that if you got caught, money would be provided for a lawyer, money would be provided for your family and friends or your family and a business might be provided for you when you got out.[3]

(T: 6246-48) (Emphasis supplied.)

From the government's point of view, this alleged structure in the conspiracy neatly explained why there was so little proof against Anthony Gaggi: its witnesses, especially DiNome and Arena, were just workers who surely would not have been privy to what went on in the executive suite. Thus it was that Frederick DiNome and Vito Arena had no direct, non-hearsay knowledge of Gaggi's supposed role in the stolen car conspiracy. Instead, it was left to Dominick Montiglio, Gaggi's nephew, to sustain the government's case against Gaggi and also Paul Castellano.* It was Montiglio, and only Montiglio, who testified that Gaggi and Castellano received monies from the car theft ring. Montiglio testified (1) that he saw slips of paper on money given by Roy DeMeo on behalf of Gaggi which reflected that the

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[3] Frederick DiNome testified that he and Henry Borelli had pleaded guilty, in 1981, to participation in the same conspiracy at issue in this case upon the order of Roy DeMeo and the assurance that his legal and family needs would be looked after. (T: 4616-18)

* As set out in petition of co-defendant Ronald Ustica, Montiglio was a witness plagued by a history of drug abuse and a failure to live up to promises that he would lead a law-abiding life.

money for Gaggi was proceeds from stolen cars (T: 3513); (2) that Gaggi regularly brought money to Castellano (T: 3516-17); and (3) that DeMeo once gave him [Montiglio] money to bring to Castellano. (T: 3520) Hence, without Montiglio, the case against Gaggi was virtually non-existent, as no witness could prove a Gaggi/Castellano connection to the proceeds of the stolen automobile conspiracy. Not surprisingly, then, one of the jury's first requests after deliberations commenced was for "Montiglio, direct examination by Mr. Mack. *Questions and answers which pertain to Montiglio's mention of Gaggi as related to car conspiracy* -- Mr. LaRossa's [Castellano's counsel] cross-examination as relates to Montiglio's mention of Gaggi involvement." (T: 7113) (Emphasis supplied.)

Montiglio, then, was the key to the government's case and it is for this reason that petitioner's arguments here focus upon the government's violations of its duties under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), with respect to Montiglio's testimony.

REASONS FOR GRANTING THE WRIT

1.

Defendant's Conviction Should Be Reversed Because the Prosecutor Failed to Make Timely Disclosure of the Fact That Dominick Montiglio Had Admitted to Prior Perjury About the Facts of This Case.

Dominick Montiglio's testimony about Anthony Gaggi's and Paul Castellano's participation in the alleged stolen car conspiracy was a decidedly recent revelation. From 1983, when he began cooperating with the government, until September or October of 1985, during over 200 hours of government interviews (T: 3864) and 129 phone calls with government agents (T: 3842-43) and testimony in the grand jury, Montiglio never informed

the government of his most crucial evidence against Castellano and Gaggi: that Castellano regularly received money from Gaggi and, at times, Montiglio. (T: 3846) As noted, when cross-examined about his curious failure to bring this information to the government's attention and, more importantly, its total absence from his March 30, 1983, grand jury testimony, Montiglio gave the astounding and surprising reply that he had *lied* in the grand jury. (T: 3863) Montiglio then testified that *he had told the government about his perjury approximately a week prior to the date he began testifying at the Gaggi trial.* (T: 3864) The prosecutor, however, did not think it was necessary to disclose this admission of perjury because he did not believe the government "should be bound by Mr. Montiglio's understanding of the word perjury . . . ." (T: 4115) The poverty of this response is manifest. Indeed, it was wholly at odds with the government's pre-trial representation that "we have continued to go through our files trying to cull out *arguably Brady* material . . . . Anytime we identify something [as *Brady* material] we *immediately* release it." (Transcript of September 24th proceeding at 6) (Emphasis supplied.)[4]

As a result of the prosecution's uinjustified inaction, the cross-examination of Montiglio "opened the door" to re-direct testimony -- to the effect that Montiglio had lied to protect Gaggi and Castellano -- that the defense would have avoided at all costs. As explained below, the effect of this failure to disclose obviously exculpatory evidence irreparably tainted the proceedings against Mr. Gaggi and now requires a new trial.[5]

The trial in this case was one of the most unique trials in our history. When Judge Duffy severed the

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[4] The transcript of this trial shows otherwise. Throughout the trial, the trial court often criticized the government for tardy disclosure of both *Brady* and Jencks Act material. (*See, e.g.*, T: 1796; T:1803-04)

[5] After Montiglio admitted to perjury, a motion for mistrial was made and denied. (T: 3868) Subsequently, another, more extensive, motion was made and denied. (T: 4100-21)

original RICO indictment because it was "totally and completely untriable from anyone's point of view" (Transcript of July 24th proceeding at 18), remarkable procedures became necessary. Resolute in his view that "we are going to try [only] a stolen car case" (Transcript of September 24th proceeding at 10), Judge Duffy insisted that both the defense and prosecution "try the case clean" (*Id.* at 12). In essence, Judge Duffy made clear that the severing of the indictment brought dangers to both sides:

> All right, you guys recognize, I trust, the government better recognize, if you have that you have an awful lot of control over what goes into this case and what doesn't go into it. And as such you are caught in a personal bind.
>
> * * *
>
> The personal bind is if you fellows launch into something which is not called for by this case and I am convinced that you have done it intentionally, a mistrial will be declared . . . and I will announce to the world that the reason it is dismissed is because of prosecutorial misconduct.
>
> * * *
>
> So you guys have yourself in a position where you better be ready to try this case and nothing else.
>
> * * *
>
> On the other hand, the defense better recognize and all the members of the defense that trial number one is not a discovery device, because if you think it is, then it all hangs out and if it all hangs out, all my attempts at avoiding slop-over and spill-back, its all yours, you got it all.

(*Id.* at 22-23)

Recognizing the unavoidable dangers created by Judge Duffy's severance, extraordinary efforts were undertaken to ensure that the cross-examination of

government witnesses would not "open the door" to prejudicial and extraneous re-direct testimony. Before the cross-examination of every significant witness in the case, there were extended arguments before Judge Duffy on the issue of what the permissible scope of cross-examination would be. Judge Duffy spent lengthy hours reviewing the § 3500 material in order to determine the lengths to which defense counsel could go on cross-examination without "opening the door" to the other allegations of criminal conduct that were contained in the original indictment. After hearing extensive argument from both sides, Judge Duffy would then rule on the permissible scope of cross-examination and the consequences of violating these restrictions. In sum, almost 1000 pages, or twelve percent of this trial record, were devoted to these issues. Surely, there have been few, if any, other trials where the consequences of cross-examination have been so thoroughly explored. In this case, time and time again, the government or the court informed counsel that a particular line of cross-examination would result in damaging re-direct testimony. (*See, e.g.*, T: 1186-87) More specifically, with respect to Dominick Montiglio, there was an extensive *pre-direct* conference on the expected nature of Montiglio's examination. (T: 3239-3306) Then, after his direct testimony, *another* conference on the same issues was held. (T: 3535-3600)

It is in this context that the government's failure to inform the defense that Dominick Montiglio had admitted to perjuring himself about Gaggi's and Castellano's role in the stolen car conspiracy must be considered.[6] For in this case, where the defense was routinely apprised, both by the government and the trial court, of the dangers of particular areas of cross-examination, the government's failure to adhere to its obvious obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), had the effect of

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[6] One must also wonder about the evidence upon which Gaggi was indicted on the car theft charges. In essence, Montiglio was the only witness against Gaggi. If he did not implicate him in the grand jury, who did? The answer is surely that no one did, and that the grand jury returned an indictment with no factual basis.

"sandbagging" the defense and wholly frustrating Judge Duffy's efforts to try a "clean case."

By neglecting to inform the defense, during either the pre-direct or even the post-direct conference, about Montiglio's confession of prior perjury, the government, whether consciously or inadvertently, *set a trap whereby Montiglio was then permitted to testify, on re-direct examination, that he had lied in an effort to protect Gaggi and Castellano from prosecution on the stolen car charge.* (T: 3940) This testimony was itself clearly a lie because, *during those same interviews and grand jury testimony,* Montiglio had not hesitated to inculpate Castellano and Gaggi in far more serious crimes, including murder. Hence, as argued in Point 2, *infra,* this re-direct examination should never have been countenanced either by the government or the trial court, as it was so plainly a lie.

However, even if it were true, *the government's failure to comply with its obligations under Brady deprived the defense of the opportunity to either challenge the government's right to elicit this devastating re-direct testimony or, in the event such a challenge failed, to forego any line of cross-examination which would result in its being elicited from Montiglio.* For this reason, a new trial is necessary. In a case where, even *before* any questions were asked of a witness, the scope of cross-examination and re-direct examination was carefully circumscribed, after argument, by the trial judge, the government had an obligation to comply with its *Brady* obligations and then permit the defense to make a reasoned evaluation of the benefits and costs of an inquiry into the prior perjury. The fact remains that, in the case of Montiglio's testimony, more than 125 pages of transcript were devoted to discussions about the proper scope of cross-examination and re-direct examination. Under these circumstances, it was inexcusable for the government not to tell the defense about this obviously crucial aspect of Montiglio's testimony.

For the past twenty-four years, since the Supreme Court decided *Brady v. Maryland, supra,* the law has been clear that the government has an obligation "to disclose evidence favorable to the accused . . . ." *United States v. Bagley,* ____ U.S. ____, 105 S. Ct. 3375 (1985). It has also been clear that "[t]he *Brady* rule applies equally to impeachment and exculpatory evidence." *United States v. Chitty,* 760 F.2d 425 (2d Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 310 (1985). Needless to say, evidence of prior perjury by a government witness is perhaps the most significant impeachment evidence that can be made available to a defendant. *See United States v. Stofsky,* 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). This being the case, the government undoubtedly violated the duties under *Brady* by not informing the defendant that Montiglio had admitted both to lying during a March 12, 1983 government interview and to perjuring himself in the grand jury.

This case, though, is not the typical *Brady* case because it does not involve "suppression of exculpatory material until *after* trial . . . ." *United States v. McPartlin,* 595 F.2d 1321, 1346 (7th Cir. 1979). Here, the issue is not the failure to disclose the evidence, but the *timing* of that disclosure. Needless to say, the government's failure to alert the defendants to Montiglio's admission of perjury was reprehensible. However, defendant recognizes that, under *Brady,* "the good faith or bad faith of the prosecution is irrelevant." 373 U.S. at 87. Hence, the issue here is whether the late disclosure of evidence the government should have disclosed "came so late as to prevent appellant from receiving a fair trial." *United States v. Williams,* 738 F.2d 172, 178 (7th Cir. 1984); *see United States v. Darwin,* 757 F.2d 1193, 1201 (11th Cir.), *cert. denied,* ____ U.S. ____, 106 S. Ct. 106 (1985). As stated in *Grant v. Alldredge,* 498 F.2d 376, 381, n.5 (2d Cir. 1974), this Court must evaluate the government's misconduct by "'*measur*[*ing*]. . . *the effect of the suppression upon defendant's preparation for trial,* rather than its effect upon the jury's verdict.'" (*quoting United States v.*

Polisi, 416 F.2d 573, 577 (2d Cir. 1969) (emphasis in original); *cf. United States v. Barnes*, 604 F.2d 121, 150 (2d Cir. 1979) (No *Brady* violation where defendant was able to take "full advantage" of material that had not been timely disclosed).

Here, the prejudice was overwhelming. For by not providing the defense with full disclosure concerning Montiglio's admission of perjury, the government "sandbagged" the defense. That is, the defense's unintentional eliciting of an admission of perjury by Montiglio opened the door to the devastating re-direct testimony, which defendant contends was itself perjurious, that Montiglio had lied in March of 1983 in an effort to protect Castellano and Gaggi.[7] Had defendant's counsel been aware that this was the price to pay for cross-examining Montiglio on the prior perjury, he would have avoided this testimony at all costs. The simple fact here is that no testimony could have been more devastating, as it fit neatly into the government's allegations about the conspiracy's corporate-like organizational structure. Montiglio's testimony on this issue offered strong support for the government's claim of conspiracy by further suggesting that lower members of the conspiracy routinely sacrificed themselves in the interests of their superiors. With Montiglio's testimony, Frederick DiNome's testimony that Henry Borelli and Frederick DiNome had pleaded guilty to the New Jersey car theft charges at the insistence of Roy DeMeo (T: 4616) was made all too plausible. In a case where the government's theory was that Anthony Gaggi had played the role of supervisor, or executive vice president, of a criminal organization, testimony that a witness had perjured himself in an effort to protect his superiors was extraordinarily significant.

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[7] This claim forms the basis for defendant's claim, in Point 2, *infra*, that a new trial is necessary because both the government and the trial court knew that Montiglio was perjuring himself but did nothing to correct his testimony so that the jury would not be misled.

It is because the government's *Brady* violation led to this overwhelmingly prejudicial re-direct examination that defendant's conviction must be reversed. The fact here is that had the defense been aware of the circumstances surrounding Montiglio's recent confession of perjury, the question of whether the government's proposed re-direct examination was permissible undoubtedly would have been raised by counsel and then ruled upon by the court. Even assuming that Montiglio's explanation was a truthful one -- *and it was not* -- there can be no doubt that defense counsel would have avoided, at all costs, Montiglio's testimony that he had lied to protect Castellano and Gaggi. Indeed, counsel made clear that they would have even foregone the opportunity to ask about the prior perjury in order to avoid this re-direct testimony:

> *Judge, had we been advised that Mr. Montiglio lied previously . . . we* could have had the option, ... and I am going to represent to your Honor right now that I would have taken this option, and in discussing with Mr. LaRossa, he *would have taken this option, of not confront[ing] Mr. Montiglio with prior inconsistent statements and going to the jury on the inherent improbability of his direct testimony.*
>
> *... I would have much preferred to argue to this jury that the three critical points that involved Anthony Gaggi were never mentioned by Mr. Montiglio in hundreds of hours of debriefings and in hundreds and hundreds of phone calls. I would have made that argument to the jury rather than have this jury believe that Mr. Montiglio lied in the grand jury to protect his uncle.*
>
> I was deprived of that option, of not confronting him with prior inconsistent statements. *I certainly would not have permitted cross-examination would*

> *have objected, had I known that he lied and that he would have come forward and said he lied to protect this man.*

(T: 1408) (Emphasis supplied.)

What more need be said? *First*, the government had an unequivocal duty to alert the defense about Montiglio's admission of perjury. *Second*, the result of this non-disclosure was extraordinarily damaging re-direct testimony in a weak case. *Third*, counsel made clear that if this re-direct testimony was the price of impeaching Montiglio with his admission of perjury, the defense would have been willing to forego that impeachment. Thus, the prejudice to petitioner could not be more obvious and, in light of the government's clear violation of its duties under *Brady v. Maryland, supra*, and its progeny, reversal of defendant's conviction is unavoidable.

Nonetheless, the Court of Appeals found no error here, stating:

> [10, 11] As the government correctly observes, no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence . . . Here, appellant Gaggi received before trial copies of all of Montiglio's statements and interviews with the government and his testimony before the grand jury. From these documents defense counsel was able to draw his own conclusions regarding Montiglio's prior silence. The only "fact" defense counsel did not have was Montiglio's own characterization of his testimony before the grand jury as "perjury". Yet, while the government has a duty to be forthcoming with favorable evidence, it is not required to draw inferences from that evidence which defense counsel is in an equal position to draw. It was obvious to defense counsel that Montiglio's sworn trial testimony was totally at odds with his earlier

> sworn statements. When the road to what defense counsel thinks is potential perjury is so plainly marked, the government need not supply a map. We see no violation by the government of its *Brady* obligations.

In essence, then, the Court of Appeals held that the government does not have an obligation to tell the defense that a government witness has admitted to perjury. According to the Court's opinion, the mere fact of prior inconsistent statements relieves the government of further *Brady* obligations. Clearly, though, an admission of perjury is something far more significant than the fact of an inconsistent statement. Every day, defense lawyers cross-examine government witnesses on prior inconsistent statements. Yet, it is an extraordinary event when a government witness admits that he has previously perjured himself. In virtually all circumstances, the witness proffers another explanation for the inconsistency.

Hence, it is not fair to say that "[w]hen the road to what defense counsel thinks is potential perjury is so plainly marked, the government need not supply a map." Slip op. at 1057. Here, the road was not so clearly marked and the government therefore had an obligation under *Brady* to inform defense counsel about this startling revelation. The failure to do so now requires a new trial.

2.

A New Trial Is Required Because the Government Knowingly Permitted Montiglio to Offer a Plainly Perjurious Explanation of His Prior Lies.

More disturbing than the damage by Montiglio's claim that he had lied in an effort to protect Gaggi and Castellano is the fact that this explanation was itself so clearly a lie. As explained below, the Jencks Act material provided in connection with Montiglio's testimony showed that he never hesitated to inculpate both Gaggi

and Castellano throughout his March 30, 1983 grand jury testimony and March 12, 1983 government interview. Indeed, he inculpated them in far more serious crimes, *including murder.* Unfortunately, the defense was unable to expose this lie because, in doing so, it would have revealed the full scope of Montiglio's allegations against Castellano and Gaggi. Needless to say, this would have frustrated one of the prime reasons -- avoidance of spill-over prejudice -- underlying Judge Duffy's severance of the indictment. Yet, as shown below, *the prosecutor, and the trial court, had to know that Montiglio was not telling the truth.* For this reason, his testimony should never have been elicited by the government. At a minimum, it should have been corrected by either the prosecutor or the court. Because it was not, the defense was saddled with a Hobson's choice: it could either have allowed Montiglio's lie to remain essentially unchallenged, thereby permitting the jury to be misled, or it could have shown Montiglio's testimony to be a lie by revealing the multitude of far more serious, and prejudicial, allegations Montiglio had made against Castellano and Gaggi. Plainly stated, it was wrong for the government to put defendant in this untenable position and it was wrong for the trial court to frustrate his laudable efforts to ensure a fair trial by then permitting it. In essence, the jury reached a verdict based upon perjured evidence. *Mr. Gaggi was found guilty upon a lie.*

Remarkably, a pre-trial discussion presaged these events, with the government being put on clear notice of its obligations:

> THE COURT: If you cross-examine him and say, "Did you commit six murders," and the guy says, "yes," fine. But if the guy says, "no," by then you are going to be able to prove that he was there as an aider and abettor in your client's murder of somebody else.

> I am not picking on you, but in general. Sure you are, if you are a damn fool. I don't know how the blazes you are going to get yourself out of it. *If the guy says, "no, I didn't commit six murders," and the 3500 material says he sure as hell did, then I would suggest at that point it would be appropriate for the government to say, "I want a second, let's take a break on this. Judge can we have a few minutes?" At which point, I will turn around to the witness and say, "the 3500 material said you committed six murders. Why are you denying it now?"* Without the jury around.

(Transcript of September 24th proceeding at 14-15) (Emphasis supplied.) Sadly, this procedure was not followed. Instead, the government and the trial court allowed Montiglio's perjury to stand. This was inexcusable, as the "special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses . . . , and undermines the administration of justice." *Nix v. Whiteside*, ____ U.S. ____, 106 S. Ct. 988, 995-96 (1986).

A. Montiglio's Explanation of His Prior Lies Was Itself Perjurious and Both the Prosecutor and the Court Had to Be Aware of This Fact.

Petitioner contends that there are three indisputable facts here:

1. *Dominick Montiglio committed perjury by testifying that he had lied, both in his March 30, 1983 grand jury testimony and during his March 12, 1983 interview with the government, in an effort to protect Gaggi and Castellano.*[8] The simple fact here is that Dominick

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[8] During cross-examination, Montiglio claimed that his alleged motive for lying was only operative during the March 12, 1983 interview. (T: 4035) This testimony is ludicrous because the lies Montiglio told in the interview were virtually identical to the lies he

(footnote continued on following page)

Montiglio never hesitated to inculpate either Gaggi or Castellano throughout his March, 1983 grand jury testimony. Indeed, defense counsel offered the court a sealed submission showing more than *100 instances* (T: 4107) where Montiglio had contemporaneously told the government that Mr. Gaggi had committed far more serious crimes.[9] This wholesale inculpation of Gaggi and Castellano for far more serious crimes unequivocally shows that Montiglio's claim that he was attempting to protect Gaggi and Castellano was an outright lie and an obvious fraud upon the jury.

2. *The government and the trial court must have known that Montiglio was perjuring himself.* The defense submission showing how often Montiglio had inculpated Gaggi in March of 1983 was culled from the § 3500 material, which, of course, had been extensively reviewed by all parties, *including Judge Duffy*. This being so, both the government and the court necessarily knew that Montiglio had made no effort to protect either Gaggi or Castellano during his grand jury testimony. Indeed, the government's lack of candor is amply demonstrated by a discussion in which defense counsel inquired into the consequences of (1) showing Montiglio portions of the § 3500 material without revealing the contents to the jury and (2) then asking whether he had been protecting Gaggi and Castellano:

> MR. MACK: The fact is one of the reasons he was protecting both of them was of his feeling that Mr. Castellano interceded on his behalf in a loan-sharking transaction that saved his life. We are treading on a very dangerous area here.

(footnote continued from previous page)
told in the grand jury. Even if true, though, this distinction is irrelevant because the issue here is whether his explanation of his prior lies about Castellano and Gaggi, if it referred to the interview, the grand jury testimony, or both, was a lie.

[9] This submission was sealed. It is, however, part of the record on appeal.

> MR. LA ROSSA: *You have to be kidding. In the same debriefing he says Castellano gave the okay to kill Ippolito.* Castellano was picking up loan-shark. I can't believe you are bringing that up. He should answer these questions yes and no, and he should be instructed to do so. You can't have it both ways.

(T: 3993) (Emphasis supplied.)

3. *Only the government or the trial court could have adequately corrected the damage done by Montiglio's perjurious re-direct testimony.* As noted, the only way to impeach Montiglio about this perjurious explanation would have been to point out the myriad instances where he had inculpated Castellano and Gaggi in March of 1983. Counsel did challenge Montiglio to the extent of asking him to read certain portions of the § 3500 material and then, without identifying the substance of the testimony he had just read, admit that he had not sought to protect Castellano or Gaggi when he made those prior statements. (T: 4630-31) However, this attempt was inevitably a feeble and inadequate one. It in no way revealed the magnitude of Montiglio's lie for it in no way showed that Montiglio had inculpated Castellano and Gaggi in crimes far more serious than auto theft. Hence, counsel was prevented from showing the jury that it would have been absurd for Montiglio to be protecting these individuals on the lesser crime of involvement in a stolen car ring when he was implicating them in far more heinous crimes, including murder. For all the jury knew, the sections of the grand jury testimony that were shown to Montiglio may well have involved petty crimes. Unfortunately, this was *all* the defense could show because any more specific interrogation of Montiglio would have led to revelations about the scope of his allegations against Castellano and Gaggi. This being so, the only way to have adequately insured that the jury would not believe Montiglio's previous re-direct would

have been for Mr. Mack, or the trial court, to inform the jury that Montiglio was lying. Unfortunately, this was not done.

B. Defendant Is Entitled to a New Trial.

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty . . . ." *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see Mooney v. Holohan*, 294 U.S. 103, 112 (1934); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because it involves "a corruption of the truth-seeking function process," the knowing use of perjured testimony requires a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103-04 (1976). More recently, the Supreme Court reformulated this test by stating that the knowing use of perjured testimony requires a new trial "unless failure to disclose it would be harmless beyond a reasonable doubt." *United States v. Bagley, supra*, 105 S. Ct. at 3382.

Here, of course, the failure to inform the jury that Montiglio was lying cannot be deemed harmless beyond a reasonable doubt. To the contrary, Montiglio's testimony was the glue that held the government's case against Gaggi and this perjurious re-direct testimony defrauded the jury into believing that the government's theory of the case had much more substance to it than it really had. In a case where the prosecution devoted great effort to showing that the alleged conspiracy was hierarchical, Montiglio's claim that he had lied in order to protect Gaggi and Castellano dovetailed with the prosecution's theory of a corporate-like structure for the conspiracy and undoubtedly provided substantial support for it in the eyes of the jury. Moreover, this lie tainted the entire defense attempt to impeach Montiglio, as his perjurious explanation of his prior lies turned a potentially devastating impeachment tool into a prosecution aid. Through Montiglio's re-direct testimony, the jury

was provided with an untruthful basis for concluding that his prior lack of candor evidenced a desire to protect his former co-conspirators rather than an inability to tell the truth. The prejudice that flowed from this unwarranted inference was overwhelming because, as noted, Montiglio was the key witness against Gaggi and his reliability was undoubtedly determinative of guilt and innocence. *See Napue v. Illinois, supra.* Hence, the government's and the trial court's failure to disclose that Montiglio was lying improperly bolstered his credibility and deprived defendant of an opportunity to adequately impeach him. For this reason, petitioner's right to a fair trial was violated and he is entitled to a new trial.

C. Alternatively, At a Minimum, the Court Should Order an Evidentiary Hearing.

Ultimately, the trial court avoided confronting Montiglio's perjury by concluding: "What you fellows basically are asking me to do is to make a determination as to the credibility of Dominick Montiglio as a matter of law. I decline to do that." (T: 4120-22) This is precisely what the court should have done. As a matter of common sense, if prosecutors are barred from relying upon perjured testimony, courts have an obligation to determine whether a witness has perjured himself and then act in accordance with their rulings. Here, petitioner maintains that the proof of perjury is apparent on the fact of the record and that Judge Duffy knew this to be the case! However, even if this were not true, a hearing was necessary. This is what follows when there are disputes as to facts. Plainly, the fact that Montiglio never hesitated to inculpate Castellano and Gaggi in far more serious crimes throughout his grand jury testimony and prior government interviews provides a substantial basis for petitioner's claim of perjury by Montiglio. This being so, with petitioner having made, at a minimum, a colorable allegation of perjury, he is entitled to a hearing into the question of (1) whether Montiglio did in fact perjure himself -- a factual finding that must be made by the

trial court -- and (2) whether the government either suborned that perjury or knowingly permitted it to go uncorrected. *See United States v. Houle*, 490 F.2d 167, 170 (2d Cir. 1973), *cert. denied*, 417 U.S. 970 (1974); *United States v. Rosner*, 516 F.2d 269, 270 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976).

Nonetheless, the Court of Appeals agreed with the trial court, stating "that there is insufficient evidence in the record to permit a finding of perjury as a matter of law." (25a) Even granting the truth of this claim -- which we deny -- it fails to provide an excuse for not granting a hearing. Indeed, this is precisely the circumstance -- a dispute over fact not readily determined in the existing record -- in which a hearing should be held.

Moreover, there is a fundamental unfairness here in the Court's conclusion that the credibility of Montiglio's explanation was solely a jury matter. The peculiar facts of this case deprived counsel of the opportunity to test Montiglio's credibility on this score because, in doing so, counsel would have been required to reveal all of Montiglio's far more serious allegations. The only way to show that Montiglio was a liar would have been to show the jury that Montiglio had accused Gaggi and Castellano of far more serious crimes. Under these circumstances, it was simply unfair and wrong for both the trial court and the government to stand silent on the issue. Corrective measures should have been taken. That they were not now requires a new trial.

3.

Pursuant to Rule 19.4 of This Court, Petitioner Joins in the Arguments Contained in the Petitions of Co-Defendants Henry Borelli, Ronald Ustica, and Edward Rendini Insofar as They Are Applicable to Him and Not Inconsistent With the Arguments Raised Herein.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 164, 165, 166, 167, 168, 169 — August Term 1986

(Argued October 6, 1986 Decided January 21, 1987)

Docket Nos. 86-1171, 86-1173, 86-1174, 86-1184, 86-1185 and 86-1186

Filed: January 21, 1987

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY FRANK GAGGI, HENRY BORELLI, PETER LaFROSCIA, RONALD USTICA, EDWARD RENDINI and RONALD TUREKIAN,
Defendants-Appellants.

Before:
CARDAMONE and PIERCE, *Circuit Judges,* and BONSAL, *District Judge**

Defendants Gaggi, LaFroscia, Ustica, Turekian and Rendini appeal their judgments of conviction for conspiracy in violation of 18 U.S.C. § 371 entered in the United States District Court for the Southern District of New York (Duffy, J.) on April 9 and 11, 1986. Defendants Borelli, Ustica and Rendini appeal their convictions entered that same day under 18 U.S.C. § 2314 for

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* Hon. Dudley B. Bonsal, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

transporting stolen property in interstate and foreign commerce. Defendants Ustica and Borelli similarly appeal their 18 U.S.C. § 241 convictions; and defendant Turekian appeals his 18 U.S.C. § 1341 conviction.

Affirmed in part; reversed in part.

JUDD BURSTEIN, New York, New York (Michael Rosen, Edward M. Chikofsky, New York, New York, of counsel), *for Defendant-Appellant Anthony Gaggi.*

MICHAEL ROSEN, New York, New York (Judd Burstein, Edward M. Chikofsky, New York, of counsel), *for Defendant-Appellant Anthony Gaggi.*

HERALD PRICE FAHRINGER, New York, New York (Robert L. Ellis, Edward M. Chikofsky, Judd Burstein, New York, New York, of counsel), *for Defendant-Appellant Edward Rendini.*

Robert L. Ellis, New York, New York, *submitted Joint Brief for Defendant-Appellant Henry Borelli.*

Joel Winograd, New York, New York, *submitted Joint Brief for Defendant-Appellant Peter LaFroscia.*

Edward M. Chikofsky, New York, New York, *submitted Joint Brief for Defendant-Appellant Ronald Ustica.*

Judd Burstein, New York, New York, of counsel on Joint Brief, *for Defendants-Appellants.*

David S. Greenfield, New York, New York (Jonathan J. Silbermann, New York, New York, of counsel), *submitted brief for Defendant-Appellant Ronald Turekian.*

Appendix A
Opinion of the United States Court of Appeals

MARY LEE WARREN, Assistant United States Attorney, Southern District of New York (Rudolph W. Giuliani, United States Attorney, Southern District of New York, Michael Kellogg, Walter S. Mack, Jr., Warren Neil Eggleston, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee, United States of America.*

Appendix A
Opinion of the United States Court of Appeals

CARDAMONE, *Circuit Judge*:

This appeal presents a trial record of a malevolent group of defendants, in the accomplishment of whose violent conspiracies no one was suffered to stand in the way. The problems raised by their trial are varied and complex, not merely on account of the number of those accused, but because two events -- one unexpected, one designed -- complicated the proceedings immeasurably. Unanticipated was the murder of defendant Paul Castellano on the streets of New York City, during the trial. The planned action was the government's decision to indict two defendants for conspiracy to murder two "persons" under a statute originally enacted in 1870 to protect citizens from discrimination. Although there is no charge that constancy be Congress' guiding star, it has for over 115 years steadfastly resisted all attempts to change the meaning of the word "citizen."

BACKGROUND

Defendants Anthony Gaggi, Henry Borelli, Peter LaFroscia, Ronald Ustica, Ronald Turekian and Edward Rendini appeal their judgments of conviction entered in the United States District Court for the Southern District of New York (Duffy, J.) on April 9 and 11, 1986, after a five and one-half month jury trial. On October 4, 1984, the government filed a 78 count indictment naming 24 defendants and alleging 11 different conspiracies. On September 9, 1985, Judge Duffy severed the indictment for the separate trials.[1] The trial at issue on this appeal comprises 23 counts of the original indictment relating

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[1] The case originally was assigned to District Court Judge Sofaer. *See United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985).

to the defendants' stolen car ring involving ten individuals, six of whom are the defendants presently before us.[2]

The six defendants were variously charged with and convicted of one or more violations of 18 U.S.C. §§ 241, 371, 1341 and 2314. Section 371 makes illegal a conspiracy to transport stolen property in interstate and foreign commerce, and § 2314 proscribes the substantive crime of actually transporting such property. Section 241 makes it a crime to deprive any citizen of any right or privilege guaranteed by the Constitution or laws of the United States. Finally, § 1341 proscribes frauds perpetrated through the use of the United States mails.

The defendants, the various crimes with which they were charged, and the dispositions of the charges are as follows. The conspiracy under § 371 charged defendants with combining to ship late-model automobiles stolen on the streets of New York to Kuwait and other parts of the Middle East, Puerto Rico and other states in the United States. Gaggi, Ustica, LaFroscia, Rendini and Turekian were convicted of this conspiracy. Ustica, Borelli and Rendini were also convicted on a number of § 2314 counts; while Gaggi, LaFroscia and Turekian were acquitted on these counts. Borelli and Ustica were additionally convicted of conspiracy to deny citizens their civil rights in violation of § 241 for the murders of Ronald Falcaro and Khaled Fahd Darwish Daoud. Finally, Turekian was convicted of mail fraud in violation of § 1341 for submitting fraudulent claims to Aetna Insurance Company. An appendix included at the end of the opinion shows the charges for which each defendant was indicted, whether the charge resulted in a conviction or an acquittal, and the sentence imposed.

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[2] The other four named defendants were Joseph Testa and Anthony Senter, both acquitted by the jury, Richard Mastrangelo acquitted by the trial court at the close of the government's case, and Paul Castellano, whose murder during the trial is one of the principal issues raised on appeal.

Two of the six issues raised have already been alluded to -- the effect of publicity generated by a murder during trial and the conspiracy to commit murder. For organizational purposes the issues raised by appellants will be discussed in the following order: (I) publicity during trial, (II) civil rights murder conspiracy, (III) government's claimed misconduct under *Brady* and *Mooney,* (IV) evidentiary contentions, (V) jury instructions, and (VI) sentences.

DISCUSSION

I The Publicity During Trial

Two deaths occurred at different times during this lengthy trial prompting motions for mistrial, which were denied on each occasion. Appellants argue that the continued impartiality of the jury was destroyed by these events, and they urge further that the measures taken by the district court were inadequate to protect their rights to a fair trial.

It is not an uncommon occurrence for a notorious trial held in Metropoplitan New York to engender extensive publicity. The strong public interest in such trials has resulted in procedures to protect defendants' rights to a fair trial. In *United States v. Lord,* 565 F.2d 831 (2d Cir. 1977), we established guidelines for a district court to follow when the problem of widely disseminated publicity may prejudicially impact an ongoing criminal trial. The simple three-step process is, first, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity and, third, to examine individually exposed jurors -- outside the presence of the other jurors -- to ascertain how much they know of the distracting publicity and what effect, if any, it has had on that juror's ability to decide the case fairly. *Id.* at 838-39. Ultimately, the trial judge must examine

the "special facts" of each case, *United States v. Persico*, 425 F.2d 1375, 1382 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (quoting *Marshall v. United States*, 360 U.S. 310, 312 (1959) (per curiam)), to determine whether the jurors remained impartial. *United States v. Gigante*, 729 F.2d 78, 82 (2d Cir.), *cert. denied*, 467 U.S. 1206 (1984). Absent a clear abuse of the trial court's discretion, its finding that the jury was impartial should be upheld. *United States v. Moon*, 718 F.2d 1210, 1219 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *see Marshall*, 360 U.S. at 312 (trial judge has large discretion in ruling on the issue of prejudice resulting from publicity). With these standards in mind, we turn to the events that occurred during trial and the safeguards taken by the district court.

A. The Murder of Paul Castellano

On December 16, 1985 two and one-half months into the trial, Paul Castellano -- the lead-named defendant in the indictment and one of the named defendants on trial -- was gunned down and killed in mid-town Manhattan while out on bail. Almost immediately news of the murder appeared in virtually every newspaper, radio, and television report in New York City. Two leading newspapers reported the incident, for example, as *Mafia's Number One Blown Away*, N.Y. Post, Dec. 17, 1985 at 2 and *Organized-Crime Chief Shot Dead Stepping From Car on E. 46th St.*, N.Y. Times, Dec. 17, 1985, at A1, col. 2. The reports of this killing and subsequent investigation did not subside for several weeks. Appellants contend, as they did below, that the jury's exposure to the concededly broad media coverage of this event required a mistrial.

The day after Castellano's death Judge Duffy conducted a separate *voir dire* of each juror, asking a number of questions regarding what, if anything, the juror had heard or seen about the murder. All of the jurors knew of it, and approximately six also had heard

that Castellano had been a head of an organized crime family. None had heard any comments regarding the nine remaining defendants or about the trial, except that Castellano was a defendant before them. All of the jurors stated that they would be able to decide the case fairly and impartially. *United States v. Gaggi*, 632 F. Supp. 1019, 1020-21 (S.D.N.Y. 1986).

Following arguments heard January 6, 1986, on defendants' motion for mistrial, Judge Duffy found that the publicity had "a potential for unfair prejudice," and therefore conducted a second individual *voir dire* of each juror, including questions suggested by defense counsel. *Id.* at 1021-22. The trial court concluded that the publicity was collateral in nature, and specifically found that none of the jurors had heard or read anything concerning the remaining defendants. All of the jurors stated unequivocally that their judgment would not be affected by the media reports and that they could decide the case solely on the evidence presented. *Id.* at 1022-23. As a result, the court ruled -- based in part on the jurors' responses and in part on its own assessment of the jurors' awareness of their responsibilities and obligations -- that the jury had not been prejudiced by the media reports.

The record thus reveals that the trial court complied in every respect with this Circuit's guidelines. For instance, in *Lord*, we held that the district court should not rely solely on repetitive admonitions when widespread publicity created a strong possibility that some jurors might have been exposed to prejudicial publicity. 565 F.2d at 838. In contrast, the district court here took prompt and effective corrective action. Once it saw "a potential for unfair prejudice," it held, not one but two, *voir dires* of each juror outside the presence of other jurors, to determine the extent of the juror's exposure to the reports and its effect on his or her attitude toward the

remaining defendants. Under these circumstances, the measures taken by the district court were adequate to insure a fair trial.

Nevertheless, appellants, relying on *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) and its progeny, insist that given the scope and intensity of the media coverage and despite the precautions taken, nothing short of a mistrial could have preserved their fair trial rights. Appellants stress in particular that the district court had been especially careful throughout the trial to avoid the introduction of references to the "Mafia," "Gambino family," and "organized crime." That precaution was shattered, appellants contend, by the jurors' exposure to those references in the media reports following Castellano's murder. We cannot agree.

It is the impartiality of the jurors -- not the quantum of publicity -- that determines whether the trial proceedings may be fairly conducted. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). Further, while appellants correctly observe that the jurors were exposed to references that Judge Duffy had properly sought to avoid, they fail to demonstrate how these concerns were not ameliorated by the two individual *voir dires*. As the Supreme Court has cautioned, "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation.' " *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (per curiam) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *see United States v. Williams*, 568 F.2d 464, 470 (5th Cir. 1978) ("Obviously, reversal is not required in every case in which a news story containing facts inadmissible in evidence reaches the jury.").

Marshall is inapposite. There the Supreme Court held that the jurors' exposure to media coverage regarding the defendant's *own* prior criminal conviction, which the trial court had ruled was inadmissible because of its prejudicial effect, mandated a new trial despite assurances by the jurors that they would not be influenced by

the information. 360 U.S. at 312-13. Years later, the Supreme Court restated the *Marshall* rationale as: "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced." *Murphy v. Florida,* 421 U.S. 794, 798 (1975). Here the district court made a clear finding that not a single juror had been exposed to information regarding the remaining defendants, and that the publicity therefore was collateral in nature. On that basis it concluded that the jurors were capable of deciding the issues before them fairly and impartially. Appellants' counsel conceded at oral argument that the publicity generated by the Castellano murder did not relate directly to the issues at stake in the ongoing trial. In contrast with *Marshall,* the publicity in the instant case did not relate to the remaining defendants' guilt with respect to the charges against them. The trial court took prompt action to determine the effect of that publicity and gave the jury repeated cautionary instructions. *See Gigante,* 729 F.2d at 82. Because the trial court is in a much better position to assess the partiality of a juror, it is inappropriate for an appellate court to second-guess that face to face appraisal.

B. The Death of Frederick DiNome

On February 17, 1986, about two months after Castellano's death -- after the trial had been concluded and while the jury was deliberating -- there were news reports detailing the apparent suicide of Frederick DiNome, one of the government's major witnesses who had testified earlier in the trial. As a result, defense counsel again moved for a mistrial or, alternatively, an individual *voir dire* of the jurors. The district court denied these applications and conducted instead a general inquiry of the jury. In response to the question whether any of them had seen a newspaper that day, the

jurors responded by shaking their heads "no." The court then emphasized repeatedly that they were to avoid media reports "at all costs." The trial judge believed that a deeper inquiry would only "fuel speculation" and "distract the jurors" from their deliberations. 632 F. Supp. at 1024.

Appellants now argue that the district court abused its discretion by not examining each juror individually. In support of this argument they mistakenly rely upon cases in which actual exposure to demonstrated prejudicial publicity required the district court to conduct an individualized *voir dire* of the jury. *See, e.g., United States v. Betner,* 489 F.2d 116, 118 (5th Cir. 1974); *United States v. Rattenni,* 480 F.2d 195, 197 (2d Cir. 1973); *United States ex rel. Owen v. McMann,* 435 F.2d 813, 815 (2d Cir. 1970, *cert. denied,* 402 U.S. 906 (1971); *United States v. Kum Seng Seo,* 300 F.2d 623, 624 (3d Cir. 1962); *Coppedge v. United States,* 272 F.2d 504, 507-08 (D.C. Cir. 1959), *cert. denied,* 368 U.S. 855 (1961); *United States v. Titsworth,* 422 F. Supp. 587, 589-90 (D. Neb. 1976). Yet, appellants also point to *Lord* where only a "strong possibility" of exposure existed, 565 F.2d at 838, and where we noted that in such cases something more than mere admonitions was required. *Id.* Here, the district court did "something more." It conducted a general inquiry satisfying itself that no actual jury exposure to prejudicial information had occurred. Thus, under our three-step process an individualized *voir dire* was unnecessary.

Moreover, we agree with the district court, 632 F. Supp. at 1024, that the jury's ability to render an impartial verdict is confirmed by the care which it took in its deliberations. *See United States v. Aiello,* 771 F.2d 621, 631 (2d Cir. 1985); *Gigante,* 729 F.2d at 82. Deliberations continued from February 13 through March 5, 1986. The jury made 56 requests asking for rereadings of testimony, exhibits, stipulations, and instructions. Its

verdict "ran the gamut" with 58 findings of guilty, 90 findings of not guilty, and a deadlock on two defendants on one count. 632 F. Supp. at 1024. Such a record reveals both an impartial and meticulous jury. Hence, we see no reason to disturb the district court's discretion in refusing to make more than a general inquiry regarding DiNome's death.

II The Civil Rights Conspiracy

Appellants Borelli and Ustica were convicted under 18 U.S.C. § 241 (1982) of conspiracy to deprive Ronald Falcaro and Khaled Fahd Darwish Daoud of the right to be federal witnesses. The jury found that the conspiracy caused the death of both men. Appellants claim that § 241 applies only to conspiracies to deny citizens their constitutional rights, and that Falcaro and Daoud were not proven to be citizens beyond a reasonable doubt. Consequently, they maintain that there is insufficient evidence as a matter of law to sustain their convictions. The government responds that the district court properly ruled that this statute does not limit its protection to citizens. For the reasons that follow, we conclude that United States citizenship is a necessary element under § 241.

A. Language of § 241

"Federal crimes, of course, 'are solely creatures of statute.' " *Dowling v. United States,* 473 U.S. 207, 105 S. Ct. 3127, 3131 (1985), (quoting *Liparota v. United States,* 471 U.S. 419, 424, 105 S. Ct. 2084, 2087 (1985)). For this reason, when analyzing the range of a federal criminal statute close heed must be paid to its language, construction, legislative history, and purpose in order to determine the scope of conduct the enactment forbids. The best starting point for examination of § 241 is -- as

that familiar canon of statutory construction instructs --the language of the statute itself. *Landreth Timber Co. v. Landreth,* 471 U.S. 681, 105 S. Ct. 2297, 2301 (1985); *Watt v. Alaska,* 451 U.S. 259, 265 (1981). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

Entitled "Conspiracy against rights of citizens," § 241 makes it unlawful for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ." 18 U.S.C. § 241 (1982) (emphasis added). The statute specifically protects "citizens" against interference with their constitutional or federal statutory rights. Its language does not address harm aimed at "persons," "inhabitants," "residents," or "domiciles." When called upon to construe this statute, the Supreme Court stated that "§ 241 must be read as it is written." *United States v. Price,* 383 U.S. 787, 798 (1966). As a matter of common usage the term "citizen" is properly understood as a native or naturalized person who owes allegiance to a government and who is entitled to reciprocal protection from it. Thus, "[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning," *Burns v. Alcala,* 420 U.S. 575, 580-81 (1975), (citing *Minor v. Mechanics Bank,* 26 U.S. 44, 63, 1 Pet. 46, 64 (1828)), § 241 is plainly limited by its language to redressing conspiracies against citizens.

B. Judicial Construction of § 241

As the Supreme Court has observed, inquiry into the proper construction of a statute does not necessarily end after ascertaining the plain meaning drawn from the face of the statute. *Watt v. Alaska,* 451 U.S. at 266; *Train*

v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976). An examination of the caselaw construing § 241 is also appropriate.

A century ago, the Supreme Court answered the precise question before us today. In *Baldwin v. Franks*, 120 U.S. 678 (1887), the Court had before it a charge under § 241's identical predecessor statute based on a conspiracy to drive certain Chinese aliens from their California residences. Because the conspiracy was aimed at "alien" victims, the question arose: Who are the citizens of the United States to which the statute refers? The Supreme Court concluded: "it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents or inhabitants." *Id.* at 691. *See also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 661-62 n.36 (1979) (White, J. concurring) (discussing *Baldwin*); *United States v. Williams*, 341 U.S. 70, 81 n.7 (1951) (Frankfurter, J.) (reiterating the holding of *Baldwin*). The *Baldwin* court further explained:

> This section is highly penal in its character, ... It is, therefore, to be construed strictly; . . . doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a person only or an inhabitant. . . . For these reasons we are satisfied that the word citizen, as used in this statute, must be given the same meaning it has in the Fourteenth Amendment of the Constitution, and that to constitute the offense which is there provided for, the wrong must be done to one who is a citizen in that sense.

120 U.S. 691-92.

Thus, the Supreme Court believed that since § 241 had been enacted in the wake of the Fourteenth and Fifteenth Amendments, it must be interpreted consistently with those Amendments. Section 1 of the Fourteenth Amendment defines "citizen" as "all persons born or naturalized in the United States." U.S. Const. amend. XIV, § 1. Reading the Fourteenth Amendment alongside *Baldwin*, we are persuaded that Congress meant to restrict prosecutions under § 241 to conspiracies against persons born or naturalized in the United States.

Moreover, in the 100 years that have passed since its original pronouncement, the Supreme Court has not seen fit to alter the view it expressed in *Baldwin*. In fact, not a single court -- with the exception of the district court here -- has held that the victim of a § 241 conspiracy need not be a "citizen." Instead, every court considering this issue has either stated or assumed that American citizenship is an element of proof under the statute. *See, e.g., United States v. Harris*, 701 F.2d 1095, 1102 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983); *United States v. King*, 587 F.2d 209, 211 (5th Cir.) (per curiam), *cert. denied*, 440 U.S. 972 (1979); *Wilkins v. United States*, 376 F.2d 552, 561 (5th Cir. 1967); *Powe v. United States*, 109 F.2d 147, 149 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940); *United States v. Patrick*, 54 F. 338, 342-43 (C.C.M.D. Tenn. 1893); *United States v. Wheeler*, 254 F. 611, 624 (D. Ariz. 1918), *aff'd on other grounds*, 254 U.S. 281 (1920). Thus, in addition to the plain language of the statute itself, Supreme Court precedent requires an offense under § 241 to be committed against one who is a citizen.

C. Legislative History

The legislative history of § 241 further confirms our view concerning the proper construction of the statute. The section began its long history as § 6 of the Act of May 31, 1870, 16 Stat. 140, entitled "An Act to enforce

the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." *See United States v. Williams*, 341 U.S. 70, 73 (1951). That Act, later known as the Enforcement Act of 1870, was passed only two months after the ratification of the Fifteenth Amendment. In addition to the new § 241, the Enforcement Act of 1870 included a re-enactment of § 17 of the Civil Rights Act of 1866, 14 Stat. 27, which today is § 242. *See Price*, 383 U.S. at 801-02. We recognize that originally the chief purpose of § 241 was to provide sanctions against interference with the right of Black citizens to vote, recently guaranteed them by the Fifteenth Amendment and to protect the exercise of that right against hostile groups, particularly the Ku Klux Klan. *See Williams*, 341 U.S. at 76, 89 (Douglas, J., dissenting). On the other hand, the genesis of § 242 derived, at least in part, from a desire to protect immigrant Chinese laborers from rampant discrimination aimed at them in California. *See United States v. Otherson*, 637 F.2d 1276, 1282, 1284 (9th Cir. 1980), *cert. denied*, 454 U.S. 840 (1981). In fact, Senator Stewart of Nevada in discussing the extension of the predecessor of § 242 to protect aliens,[3] explained: "The civil rights bill had several *other things applying to citizens* of the United States. This simply extends to foreigners, *not citizens*, the protections of our laws where the State laws deny them . . . equal civil rights." *Cong. Globe*, 41st Cong., 2d Sess. 1536 (1870), *quoted in Otherson*, 637 F.2d at 1282 (emphasis added). Thus, it was Congress' purpose

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[3] Specific language in § 242, originally § 2 of the Civil Rights Act of 1866, was added in its re-enactment in the Enforcement Act of 1870 which made discrimination based on alienage an additional offense. *Compare* § 17 of the Act of May 31, 1870, 16 Stat. 144, *with* § 2 of the Act of April 9, 1866, 14 Stat. 27, both of which can be found in the Appendix to Opinion of Frankfurter, J., *United States v. Williams*, 341 U.S. at 83, which carefully traces the successive phraseology of §§ 241 and 242.

from the outset in enacting §§ 241 and 242 to address distinct evils aimed at different groups -- one citizens, the other inhabitants -- residing in the United States.

After the 1870 Act, what is now § 241 remained essentially unchanged. It next appeared in the Revised Statutes of 1874-1878 as § 5508, which was carried as § 19 without change into the Criminal Code of 1909, 35 Stat. 1092. In 1926, § 19 became § 51, 44 Stat. 462. The present day § 241 came from Title 18, United States Code Revisions of 1948. In none of the revisions or subsequent re-enactment is there any evidence of a congressional aim to alter the original scope of § 241. *Price*, 383 U.S. at 803. As Justice Frankfurter remarked in comparing § 241 with § 242: "To find this significance in the text of the Act of 1870 is not to give undue weight to differences in phraseology appearing in the statute. For the text of these sections has been considered by Congress not once but five times." *Williams*, 341 U.S. at 79. By its repeated reenactments of § 241 without substantive change after its judicial construction in *Baldwin*, Congress is presumed to have adopted that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Baldwin*, 120 U.S. at 691. Hence, Congress' original purpose "of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship" remains the touchstone of § 241 today. *See Cong. Globe*, 41st Cong., 2d Sess., pp. 3611-3613 (Remarks of Senator Pool of North Carolina on sponsoring Section 6 of the Enforcement Act of 1870), *cited in* the Appendix to *Price*, 383 U.S. at 807, 812.

If there be doubt that the word "citizen" refers only to those who are citizens of the United States, a comparison of § 241 with § 242 aids in dispelling it. The two sections were enacted together in *pari materia*; § 242 makes it unlawful to "willfully subject [under color of law] any *inhabitant* . . . to the deprivation of any rights, privileges, or immunities . . . or to different punishments,

pains, or penalties, on account of such *inhabitant being an alien,* or by reason of his color, or race, than are prescribed for the punishment of *citizens.*" 18 U.S.C. § 242 (emphasis added). In enacting these two statutes at the same time, Congress expressly limited § 241 to "citizens"; but extended § 242's protection to "inhabitants."[4] We presume that the use of different terminology within a body of legislation evidences a Congressional purpose to differentiate. *See Lankford v. Law Enforcement Assistance Administration,* 620 F.2d 35, 36 (4th Cir. 1980); *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972) (per curiam).

When referring to the predecessors of §§ 241 and 242, the Supreme Court noted this difference: "Section 19 [241] protects the 'citizen'; 20 [242] the 'inhabitant'." *Williams,* 341 U.S. at 87 (Douglas, J., dissenting). Other circuit courts have also acknowledged the distinction. For example, in *United States v. King,* the Fifth Circuit, holding that a jail inmate was a "citizen" within the meaning of the statute, announced: "Section 241 protects citizens, whereas § 242 protects inhabitants." 587 F.2d at 211. Consequently, nothing in the language of § 241 or in its neighboring provisions of the same Title, supports the government's claim that § 241 encompasses conspiracies against individuals who are not citizens. On the contrary, a comparison of § 241 with § 242 demonstrates the opposite; that when Congress used the word "citizen," it intended no other meaning than that imparted by its choice of that term.

In fact, Congress has recently acknowledged the continuing vitality of the "citizen-inhabitant" distinction made in §§ 241 and 242. In 1980, the Senate Judiciary Committee issued -- as part of its many proposed reforms to the Criminal Code -- a report detailing recommendations to amend §§ 241 and 242. S. Rep. No. 553, 96th

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[4] For the historical development of the term "inhabitant" and the origins of 18 U.S.C. § 242, see *United States v. Otherson,* 637 F.2d 1276, 1279-85 (9th Cir. 1980).

Cong., 2d Sess. 461 (1980). Although the Committee's recommendations were not enacted into law, he report illustrates the narrow limits of prosecution under § 241 and, as a result, reinforces our conclusion.

In describing its proposed consolidation of §§ 241 and 242, the Committee remarked: "The former statute has been recast to protect all persons rather than just citizens." *Id.* It explained:

> The Committee has also somewhat expanded the reach of section 241 by eliminating the restriction that the victim be a "citizen." Instead, the citizen or non-citizen status of the victim will be irrelevant. The focus will be on the nature of the right, privilege, or immunity involved; if it is one secured by the Constitution or laws of the United States, the proposed statute will come into play. To be sure, cases in which the non-citizen status of the victim has prevented successful prosecution are few. The Committee, though, sees no reason for maintaining the limitation in view of the fact that aliens in this country are protected by an abundance of Federal constitutional and statutory provisions, and hence are likewise deserving of protection, by the operation of penal sanctions, against persons who deliberately seek to deprive them of those rights. Significantly, 18 U.S.C. 242 does not appear to be limited to a citizen-victim.

Id. at 464 (footnotes omitted). Despite the proposed amendment's lack of success in the 96th Congress, a similar bill, one which carried over the proposed unenacted language, was introduced in the next Congress. S.1630, 97th Cong., 1st Sess. § 1501 Cong. Rec. (1981). The purpose of this bill also was to expand the reach of § 241 by eliminating the restriction that the victim be a "citizen." S. Rep. 307, 97th Cong., 1st Sess. 489, 492 (1981). Once again the attempt to broaden § 241

failed. In fact, a later proposed amendment took out the "person" language and reinstated the original more restrictive "citizen" language of the present § 241. Amend. No. 1351 to S.1630, 128 Cong. Rec. 88 (1982). The original Senate bill and the proposed amendment to it were never enacted.

Thus, Congress has many times considered and each time *ultimately rejected* the exact expansion of § 241 sought by the government in this case. Consequently, we decline to amend this statute under the guise of construing it when Congress has refused. *See Fedorenko v. United States*, 449 U.S. 490, 513 (1981).

D. Government Arguments

Although we have set forth our view in some detail, the government has made two arguments that deserve further comment. First, while acknowledging *Baldwin*'s holding that the word "citizen" in § 241 must be given the same meaning it has in the Fourteenth Amendment, the government, citing *Plyler v. Doe*, 457 U.S. 202 (1982), points to the fact that the Fourteenth Amendment's protections have been applied to aliens since the *Baldwin* decision. Therefore, the government argues, under *Baldwin* itself the word "citizen" must now include "aliens." A close reading of *Plyler* reveals that the government's reliance is misplaced. That case held essentially that an alien is a "person" as that term is used in the equal protection clause of the Fourteenth Amendment. 457 U.S. 202, 210-16. It did not address the meaning of the word "citizen." In fact, both the equal protection and due process clauses, which in the recent past have been held to protect the rights of aliens present in this country, use the term "person." U.S. Const. amend. XIV, § 1. But, at the same time, the citizenship and the privileges and immunities clauses relied on by the Supreme Court in *Baldwin*, 120 U.S. at 690, define

and use the term "citizen." In short, the government's argument simply fails to recognize that the Fourteenth Amendment itself distinguishes between "persons" and "citizens."

Further, even were the strength of this distinction less apparent, a time-honored tenet of statutory construction directs that a court called upon to apply an ambiguous penal statute should not construe it in favor of sanctions, but strictly in favor of lenity. *See, e.g., Dowling*, 473 U.S. at ____ , 105 S. Ct. at 3132; *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971) ("The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute."); *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

Finally, the government urges as a matter of policy that aliens who serve as federal witnesses should be entitled to reciprocal federal protection. But the protections of § 241 do not extend to non-citizens, however salutary such an extension may be. The problem -- being statutory, and not constitutional -- has been and presently is still subject only to congressional remedy. Consequently, while as a matter of policy such a change may be desirable, it is for Congress and not this Court to effectuate. *See Baldwin*, 120 U.S. at 692. Thus, for the reasons discussed, United States citizenship is a necessary element of proof under 18 U.S.C. § 241.

E. Proof of Violation of § 241

In light of our conclusion, the question remaining is whether the government demonstrated that either Falcaro or Daoud was an American citizen beyond a reasonable doubt. Khaled Daoud was a Jordanian citizen present in the United States on a non-immigrant visa at

the time of his murder. The citizenship of Falcaro is less clear. Falcaro's wife testified that at the time of his death her husband resided in Nassau County, was licensed by New York State as an automobile dealer, and paid both state and federal taxes. By special verdict, the jury found Falcaro to be an American citizen based on this testimony.

The evidence as to both victims fails to satisfy the government's burden of proof. Daoud is a Jordanian citizen, not an American citizen. And, although the jury found that Falcaro was a United States citizen, the evidence presented could as readily have proved either resident alien status or American citizenship. Consequently, no rational jury could have found Falcaro to be a citizen beyond a reasonable doubt. In light of the scant trial evidence on this issue, we hold that it was insufficient as a matter of law to support the convictions of appellants Borelli and Ustica under § 241. Accordingly, those convictions must be reversed.

III The Government's Alleged Misconduct

In his 1983 sworn statement and grand jury testimony, a key government witness, Dominick Montiglio, failed to implicate his uncle, defendant Anthony Gaggi, in the car theft conspiracy. But at trial Montiglio testified extensively regarding Gaggi's involvement in the cars-to-Kuwait ring. When cross-examined by defense counsel about his earlier silence, Montiglio replied that he had lied to the grand jury. Montiglio also stated that he had told the government about his "perjury" a week before he testified at the trial. On re-direct, the witness stated that in his earlier interviews with the government he had hoped by his silence to protect his uncle.

Appellant Gaggi contends that the government violated its duty under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Montiglio's "perjury." Such

failure, the defense maintains, led it to "open the door" to the damaging re-direct testimony of "protection-by-silence" that defense counsel would have avoided "at all costs." Gaggi further claims that the government knew that even Montiglio's explanation on re-direct was itself prejurious, and accordingly, that he is entitled to a new trial under *United States v. Agurs*, 427 U.S. 97 (1976).

A. The Government's Brady *Obligations*

Due process imposes upon the government an obligation to disclose material evidence favorable to an accused. *Brady*, 373 U.S. at 87. The duty to disclose encompasses not only exculpatory evidence, but also evidence that may be used to impeach a government witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972). At the same time, "the prosecutor is not required to deliver his entire file to defense counsel." *United States v. Bagley*, ____ U.S. ____, 105 S. Ct. 3375, 3380 (1985). A new trial is required only if the government withholds *material Brady* evidence. *Bagley*, 105 S. Ct. at 3384.

Appellant Gaggi does not claim that the prosecutor improperly withheld exculpatory or impeachment evidence. Rather, the complaint is that the prosecutor failed to disclose evidence to the defense which, had it been aware of, it would have used to avoid Montiglio's damaging explanation on re-direct. Thus, the claimed error was the government's failure to disclose information that might have been helpful to the defense in conducting its cross-examination of a government witness. *See Bagley*, 105 S. Ct. at 3381.

As the government correctly observed, no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence. *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Stewart*, 513 F.2d 957,

960 (2d Cir. 1975). Here, appellant Gaggi received trial copies of all of Montiglio's statements and interviews with the government and his testimony before the grand jury. From these documents defense counsel was able to draw his own conclusions regarding Montiglio's prior silence. The only "fact" defense counsel did not have was Montiglio's own characterization of his testimony before the grand jury as "perjury." Yet, while the government has a duty to be forthcoming with favorable evidence, it is not required to draw inferences from that evidence which defense counsel is in an equal position to draw. It was obvious to defense counsel that Montiglio's sworn trial testimony was totally at odds with his earlier sworn statements. When the road to what defense counsel thinks is potential perjury is so plainly marked, the government need not supply a map. We see no violation by the government of its *Brady* obligations.

B. The Government's Mooney *Duties*

Under *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam), the prosecution has a duty to refrain from eliciting and relying upon testimony known to be perjurious. A new trial is required if the government uses perjured testimony that is uncorrected and reasonably likely to have affected the outcome. *United States v. Agurs*, 427 U.S. at 103; *see Giglio*, 405 U.S. at 154.

Appellant Gaggi argues that Montiglio's explanation that he remained silent in 1983 to protect Gaggi is perjurious because Montiglio actually inculpated his uncle in serious crimes during both his grand jury testimony and his government interview. Gaggi maintains that the government, aware of this fact, knowingly relied on this perjurious testimony. The government, on the other hand, asserts that Montiglio never told it before trial that he had committed "perjury" in his earlier statements. Further, the government insists that Montiglio's explanation is truthful.

Ruling on this question below, Judge Duffy declined "to make a determination as to the credibility of Dominick Montiglio as a matter of law," preferring to leave this as a fact for the jury. We agree with the district court's disposition of this question concluding, as it did, that there is insufficient evidence in the record to permit a finding of perjury as a matter of law. Accordingly, Gaggi's *Mooney* claim must fail.

IV Evidentiary Contentions

Two evidentiary rulings of the district court are challenged. Such rulings are treated with deference on appeal, particularly with respect to questions of relevancy. *United States v. Southland*, 760 F.2d 1366, 1375 (2d Cir.) (Friendly, J.), *cert. denied*, 106 S. Ct. 82 (1985). Similarly, Fed. R. Evid. 403 gives the trial court broad discretion to weigh the probative value of evidence against its possible prejudicial effect and to determine whether, on balance, the evidence should be admitted to excluded. *United States v. Martinez*, 775 F.2d 31, 37 (2d Cir. 1985). Because the trial court is in a superior position to evaluate the likely impact of the evidence, its evidentiary rulings are seldom overturned. *United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 106 S. Ct. 258 (1985); *United States v. Robinson*, 560 F.2d 507, 514-15 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978).

A. Borelli's New Jersey Conviction

On August 4, 1981 in the United States District Court for the District of New Jersey, Borelli pled guilty to participation in a car-theft conspiracy. Judge Duffy admitted that judgment of conviction into evidence against Borelli without a limiting instruction. Borelli claims that use of the conviction is barred by the terms

of his plea agreement. Alternatively he argues that the conviction was "other crimes" evidence, Fed. R. Evid. 404(b), that should have been accompanied by an instruction cautioning the jury against considering it as proof of his criminal propensities.

The first argument rests on a statement made by the District of New Jersey judge during a Rule 11 inquiry (Fed. R. Crim. P. 11(e)(1)(B)) to determine the court's acceptance of Borelli's plea. At one point that court stated:

> Your plea or offer to plead, as well as anything else you say here under oath in your lawyer's presence cannot be used against you in any criminal proceeding other than the one we're concerned with right now. Do you understand that?

Borelli's contention that this statement barred Judge Duffy from admitting his New Jersey conviction into evidence miscomprehends the nature of a Rule 11 inquiry. The statement made in the District Court of New Jersey signifies that any statements made by Borelli during his guilty plea allocution could not be used against him in a subsequent criminal proceeding. It does not mean that the government is forever foreclosed from proving the *fact* of conviction from the public records. Because the trial evidence challenged in the instant case consisted only of the fact of conviction, not the minutes of the guilty plea allocution, its use was not barred by Borelli's plea agreement.

Again, as the government correctly points out, the court in New Jersey read from the bench the following excerpt from Borelli's plea agreement: "The agreement further states that it's limited to the U.S. Attorney's Office in this district and cannot bind other Federal, state or local prosecuting authorities. That is the limit of their jurisdiction." We enforce such clauses. *See, e.g., United States v. Persico,* 774 F.2d 30, 33 (2d Cir. 1985).

Thus, Judge Duffy did not abuse his discretion in allowing the New Jersey conviction into evidence.

Moreover, appellant Borelli was not entitled to a "similar acts" or "other crimes" limiting instruction. His conviction was not admitted to show his criminal propensity, but was instead direct evidence of his involvement in the larger conspiracy. *See United States v. Paoli*, 603 F.2d 1029, 1035 (2d Cir.), *cert. denied*, 444 U.S. 926 (1979) (testimony regarding narcotics transaction was not "other crimes" evidence, but direct proof of the conspiracy charged.). Accordingly, no limiting instruction was required.

B. The Scorney Murder

Joseph Scorney, a car thief working with some members of the emerging cars-to-Kuwait scheme, was murdered by his accomplice Vito Arena in 1978. Defendant Turekian allegedly participated in the murder by serving as a "look-out," supplying the murder weapon, and assisting in the body's disposal. Testimony at trial revealed various possible reasons for Scorney's murder. For example, he had resisted the operation's change from a group of "local thieves" to a larger and more organized car theft ring, had threatened to kill another accomplice's children if anything happened to his car, was planning to "set-up" Arena so that Arena would be excluded from the operation, had refused to participate in the exportation of stolen cars and had caused tension and competition among the other street auto thieves by his presence.

The district court found the evidence concerning the Scorney murder relevant to the formation and early stages of the stolen car conspiracy because such testimony indicated that Scorney was murdered in order to "pave the road" for the participation of other more willing co-conspirators, such as Arena. Judge Duffy also

concluded that the evidence's probative value outweighed the danger of unfair prejudice. *See United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982) (weighing these competing interests rests in sound discretion of trial court).

On appeal, Turekian argues that the district court's finding simply ignores Frederick DiNome's testimony that Scorney was "not killed over cars." Appellant maintains here, as he did below, that evidence of the murder was irrelevant to the stolen car charges on trial and that its admission was highly prejudicial. Even were this argument accepted at face value, it would not dispel the existence of other testimony linking Scorney's murder to the conspiracy. Because some of the reasons for Scorney being killed are relevant to the conspiracy's formation and development, the district court did not act arbitrarily or irrationally in admitting evidence of Scorney's murder. *See United States v. Tramunti*, 513 F.2d 1087, 1118 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) (co-conspirator's murder admissible as evidence of the means taken in furtherance of conspiracy goals.).

Finally, Turekian claims that without the evidence of his participation in the Scorney murder there is insufficient independent, non-hearsay evidence of his membership in the car ring to render declarations of co-conspirators admissible against him under *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). As the evidence of Turekian's participation in the Scorney murder was properly admissible, we need not address this issue.

V The Jury Instructions

During deliberations the jury requested additional instructions on aiding and abetting. The trial court responded by giving a supplemental charge that included examples of stolen car offenses. One such illustration

focused on applying illegal emission stickers. Because his alleged participation in the conspiracy consisted mainly of supplying illegal emission stickers, Rendini claims that this supplemental charge unduly prejudiced him before the jury. Similarly, Turekian, who was convicted of mail fraud for submitting fraudulent insurance claims to Aetna, now argues that the district court's instructions on mail fraud improperly allowed the jury to find him guilty without the requisite *mens rea*.

The effect of these challenged instructions is determined in light of "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). *Accord United States v. Gleason*, 616 F.2d 2, 14 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980).

Taking up Rendini's challenge, it has been said that examples paralleling the facts of the case under consideration by a jury were disfavored. *See, e.g., Gleason*, 616 F.2d at 14; *United States v. Dizdar*, 581 F.2d 1031, 1037 (2d Cir. 1978). In the case at bar the example was highly analogous to the facts inculpating Rendini; as such it was more likely to be prejudicial than helpful, particularly when other non-prejudicial examples were available. Nonetheless, the error does not require reversal. Viewing the entire charge in context, the example given by the trial court loses any serious prejudicial effect. The jury was adequately advised of the law of aiding and abetting, and was warned repeatedly not to equate the examples given with the facts in the case before it. Moreover, other non-prejudicial examples were also provided. Thus, while the emission sticker example was ill-advised, whatever prejudice it may have occasioned was harmless when viewing the charge as a whole.

We also decline to upset Turekian's conviction. The mail fraud charge, viewed as a whole, was proper; in fact, it parallels the standard approved instructions on

this subject. *See, e.g., United States v. London,* 753 F.2d 202, 206-07 (2d Cir. 1985). The trial court in addition specifically instructed the jury that in order to find defendant Turekian guilty, it had to find that he "acted knowingly and willfully and with a specific intent to defraud." Hence, the charge properly instructed the jury on the requisite *mens rea* to convict the defendant for mail fraud.

VI The Sentences

Appellants Ustica, Borelli, and Rendini seek to vacate their sentences. They assert that the district court sentenced them in a mechanistic manner, failing to exercise its sentencing discretion. Rendini also argues that his sentence constitutes cruel and unusual punishment. Yet, absent a claim that the sentence was illegally imposed, in excess of the applicable statutory maximum, based upon materially incorrect information, or the result of a constitutionally defective sentencing procedure, ordinarily we decline to interfere with the exercise of a trial court's sentencing discretion. *United States v. Slocum,* 695 F.2d 650, 657 (2d Cir. 1982), *cert. denied,* 460 U.S. 1015 (1983); *accord Dorszynski v. United States,* 418 U.S. 424, 431 (1974) ("[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

Looking first at appellant Ustica's sentencing allocution, the trial court did not act mechanistically in imposing concurrent five and ten year terms. It found that without Ustica's key role in the conspiracy as a car dealer "there could not have been a successful operation." Thus, it properly centered on Ustica's individual participation before sentencing him. Turning next to appellant Borelli, it was within the trial court's discretion to

impose consecutive 10-year sentences for each of this defendant's convictions under § 2314. Given that each count represented a discrete segment of Borelli's criminal activities, it was appropriate to impose a separate term for each conviction. With regard to appellant Rendini, who also received a ten year sentence for each § 2314 conviction, Judge Duffy particularly noted that Rendini supplied arms to his co-conspirators which were used in the commission of the homicides. Rendini's argument that his conviction and sentence resulted from *Pinkerton* principles of vicarious accessorial liability -- even if true -- is of no help to him. Consecutive sentences may properly be imposed upon such type of culpability. *See Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946); *United States v. Crosby,* 314 F.2d 654, 657 (2d Cir.), *cert. denied,* 373 U.S. 923 (1963). In setting Rendini's sentence, the district court also considered Rendini's flagrant dealing in narcotics from the courthouse telephones during his trial. Under these circumstances, the district court plainly did in fact consider the individual role played by each defendant and acted within its discretionary power in imposing sentence. *See Dorszynski v. United States,* 418 U.S. at 431.

Finally, we must decide whether appellant Rendini's sentence is so disproportionate that it violates the Eighth Amendment. *United States v. Ortiz,* 742 F.2d 712, 714 (2d Cir.), *cert. denied,* 469 U.S. 1075 (1984). The factors to be considered in evaluating proportionality include the gravity of the offense, the harshness of the penalty, and the sentences imposed on other criminals for the same crime. *Solem v. Helm,* 463 U.S. 277, 292 (1983). The Supreme Court has warned that we should not substitute our judgment for that of the sentencing court, but when applying the Eighth Amendment to decide only whether the sentence is within constitutional limits; a review that rarely requires extended analysis. *Solem,* 463 U.S. at 290 n.16.

In considering the gravity of Rendini's offense, the violent nature of the car theft conspiracy, the danger it represented to the community, and the continued disrespect for the law Rendini exhibited by engaging in narcotics transactions during his trial are all strongly persuasive factors. Regarding the claimed harshness of the penalty, Rendini did receive the maximum statutory prison term, but he was not fined to the statutory limit. Although a review of similar sentences for the same crime reveals that his sentence is longer than the average sentence imposed in similar cases, the heavier sentence is properly justified by the particularly violent nature of the conspiracy. *See Ortiz*, 742 F.2d at 717 (a sentence which was double the average sentence imposed was not disproportionate). In sum, there is no constitutional basis for reversing the sentence imposed inasmuch as it falls within statutory limits and is not grossly disproportionate to the seriousness of the offense.

CONCLUSION

The judgments of conviction appealed from are all affirmed, except for appellant Ustica's and appellant Borelli's convictions under 18 U.S.C. § 241 which are reversed.

Judgment affirmed in part, reversed in part.

Appendix A
Opinion of the United States Court of Appeals

APPENDIX "A"

Defendants	*Indictments*	*Sentences*
Gaggi	§ Conspiracy -- Convicted --	5 years (§ 371) $10,000 fine
	§ 2314 Counts (Acquitted on all Counts)	--------
Ustica	§ 371 Conspiracy § 241 Civil Rights Count § 2314 Counts -- Convicted on all Three Charges -	Concurrent Terms of Life (§ 241) 10 years (§ 2314) 5 (§ 371)
LaFroscia	§ 371 Conspiracy -- Convicted --	5 years (§ 371)
	§ 2314 Counts (Acquitted)	--------
Borelli	§ 241 Civil Rights Count § 2314 15 Counts -- Convicted on Both Charges --	Consecutive Terms of Life (§ 241) +150 (§ 2314) (10 yrs per count)

APPENDIX "A" (continued)

Defendants	*Indictments*	*Sentences*
Rendini	§ 371 Conspiracy § 2314 16 Counts	Consecutive Terms of
	-- Convicted on Both Charges --	5 years (§ 371) +160 (§ 2314) $85,000 fine (10 yrs per count)
Turekian	§ 371 Conspiracy § 1341 Mail Fraud	Concurrent Terms of
	-- Convicted on Both Charges --	5 years (§ 371) (Mail Fraud)
	§ 2314 Counts (Acquitted on all Counts)	--------

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13 day of March, one thousand nine hundred and eighty-seven.

FILED: March 13, 1987

Docket Nos.
86-1171, 86-1173, 86-1174, 86-1184, 86-1185, 86-1186

UNITED STATES OF AMERICA,
Appellee,

-v.-

ANTHONY FRANK GAGGI, HENRY BORELLI, PETER LA FROSCIA, RONALD USTICA, and RONALD TUREKIAN,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Anthony F. Gaggi, Henry Borelli, Peter La Froscia, Ronald Ustica, and Ronald Turekian, defendants-appellants.

Upon consideration by the panel that heard the appeal, it is

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith
Clerk